Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 76-233

CITY OF DAYTON,

Respondent

vs.

WALTER OTTO,

Petitioner

BRIEF FOR RESPONDENT IN OPPOSITION

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American R. Express Co. v. Levee,
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OTHER AUTHORITIES

Sec. 806-31, Code of General Ordinances
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CITATIONS TO OPINIONS BELOW

Petitioner is not aware of the publication of any of the decisions delivered in the courts below.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Petitioner's three questions properly stated are:

1. Whether Section 806-31, Code of General Ordinances of The City of Dayton,is so indefinite as to violate the Fourteenth Amendment to the Constitution of the United States.

2. Whether a jury verdict in a criminal case which merely states the defendant is guilty as charged violates the Due Process provision of the Constitution of the United States.

3. Whether the juror in a criminal case must sign both the verdict and the Entry which is filed by the trial judge.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set out in the petition.

COUNTER-STATEMENT OF CASE

In September of 1971, a City Housing Inspector, Mr. Gary Horseman, inspected the exterior of the dwelling at 123 Rebecca. He determined that eleven (11) violations of The City of Dayton Housing Code existed at the dwelling. He reduced these violations to a written form Numbered N 684, titled "Notice of Violations and Orders for Compliance." No other notice and order would bear this number. The said notice was served personally upon Mr. Otto, on February 29, 1972, by Mr. Roger Baxter who explained the notice to Mr. Otto. This notice and order set out the housing violations which the inspector determined to exist at 123 Rebecca and ordered specific remedial action to correct each of the violations indicated in the said notice. The notice further provided that such repairs must be accomplished within sixty days of the date of service.

On November 8, 1972, a re-inspection of the exterior of the dwelling was made by Mr. Baxter. None of the violations appearing on the notice and order had been corrected.

Thus, on November 9, 1972, Mr. Baxter filed a complaint affidavit in Dayton Municipal Court, Criminal Division. Said complaint charged that:

> "On or about the 8th day of November, 1972, in the City of Dayton, County of Montgomery, State of Ohio, Walter Otto did unlawfully fail to obey the legal order of a housing inspector in regard to a certain dwelling owned and occupied by said Walter Otto, located at 121 and 123 Rebecca Street in said City of Dayton, Ohio contrary to Section 806-31, Code of General Ordinances of The City of Dayton."

Trial was held in Dayton Municipal Court, Criminal Division, Honorable Erwin Kilpatrick presiding, on May 31 and June 1, 1973.

In his charge to the Jury on June 1, 1973, Judge Kilpatrick explained the charge against the Petitioner, Mr. Otto, as follows:

> "... The affidavit in this case charges that on or about the 8th day of November, 1972, in the City of Dayton, County of Montgomery, State of Ohio, Walter Otto did unlawfully fail to obey the legal orders of a housing inspector in regard to certain dwelling owned and occupied by said Walter Otto, located at 121 and 123 Rebecca Street, in said City of Dayton, Ohio, contrary to Section 806-31, Code of General Ordinances of the City of Dayton ..."

On June 1, 1973, the jury returned the following verdict, in open court with all jurors, Mr. Otto, Judge Kilpatrick and the Prosecutor present:

> "We, the jury, being impaneled and sworn, do find the Defendant Walter Otto guilty of the charge of failure to obey orders of Housing Inspector in violation of Section 806-31 of the Codified Ordinances of the City of Dayton, Ohio, and we do so render our

verdict upon the concurrence of all twelve members of our jury.

"Each of us concurring in this verdict signed his or her name on this 1st day of June, 1973."

On June 7, 1973, the Judgment Entry was filed; it read as follows:

"This cause coming on before the jury duly impaneled and sworn, and the said jury having heard the testimony adduced by the parties, the exhibits the arguments of counsel, and the charge of the Court, after deliberation thereon, returned the following verdict, to-wit:

'We, the Jury in this case, being impaneled and sworn, do find upon the issues in this case, the defendant, Walter Otto, GUILTY as charged in the affidavit and do render our verdict upon the concurrence in said verdict signs his name this 1st day of June, 1973.'

Julia M. Wical
John D. Sorrell
Twila H. Oldham
Bettey V. Johnson
Bettie Ray
Elmer Will
Guy Hunley
John B. Carter
Eunice O. Munger
Clara M. Shelley
Julian Brooks
Helen C. Goecke

"IT IS, THEREFORE, considered and adjudged by the Court that Walter Otto, the defendant, pay or secure to be paid a fine of $200.00 and that he pay the costs of prosecution, and the costs of Jury in the amount of $215.85 for which judgment is rendered against him, and execution awarded.

"It is further ordered that $200.00 of the fine be and the same hereby is suspended upon the future good behavior of the defendant and upon further condition that he has no more violations, of a similar nature."

Petitioner then appealed to the Court of Appeals of Montgomery County, Ohio, Case No.4320. Said Court of Appeals in an opinion rendered on November 13, 1973, affirmed the order and judgment of the Dayton Municipal Court. On February 19, 1974, Petitioner filed a Memorandum in Support of Claimed Jurisdiction, in the Supreme Court of Ohio, Case No. 74-153. On April 26, 1974, the Supreme Court on its own motion dismissed the case for the reason that no substantial constitutional question exists.

Petitioner filed an Amended Complaint with Dayton Municipal Court. Said Amended Complaint, which prayed that Petitioner be relieved from the judgment of Dayton Municipal Court, was denied. Petitioner again appealed to the Court of Appeals of Montgomery County, Ohio, Case No. 4933. The Court of Appeals on January 19, 1976 rendered an opinion which affirmed the Municipal Court's opinion on both the Amended Complaint and the original judgment and sentence.

Petitioner then sought to appeal the decision of the Court of Appeals, of Montgomery County, Ohio, to the Supreme Court of Ohio, (Case No. 76-314). The Supreme Court of Ohio on June 11, 1976 dismissed Petitioner's Appeal for the reason that it did not involve any substantial constitutional questions.

REASONS FOR DENYING THE WRIT

No decision of the highest state court of Ohio has been made in which the validity of a state statute has been drawn in question on the ground of its being repugnant to the United States Constitution, or where any title, right, privilege or immunity is specially set up or claimed under the United States Constitution.

THE DECISION BELOW DID NOT INVOLVE FEDERAL QUESTIONS BELOW

Petitioner's brief attempts to fashion an appeal from a decision of the Ohio Supreme Court. In reality the Supreme Court of Ohio, refused to take jurisdiction over Petitioner's appeal for the reason that it involved no substantial constitutional question.

In American R. Express Co. v. Levee, (1923) 263 U.S. 19, 68 L.Ed. 40, 44 S 11, this Court held that the refusal of the highest state court to hear an appeal from a decision of an intermediate State court was not the decision of the highest state court for purposes of appeal to the U.S. Supreme Court. The refusal, however, did make the decision of the intermediate appellate court, the decision of the highest state court that could be had. Petitioner's appeal is therefore not from the decision of the Ohio Supreme Court, but from the decision of the Court of Appeals of Montgomery County, Ohio, in Case No. 4933.

The basis of Petitioner's appeal in the Court of Appeals of Montgomery County, Ohio, Case No. 4933, is impossible to determine from

Petitioner's numerous briefs, due to his rambling, almost incoherent style of writing. The Court itself had difficulty in determining the grounds for Petitioner's appeal, but finally made the following observation in its opinion:

> "On April 23, 1975, Mr. Otto filed what has been styled a 'complaint for post-conviction remedies,' and on May 27, 1975, he filed an 'amended complaint' requesting that the previous judgment and sentence be vacated and set aside. The prayer of the amended complaint was denied on June 5, 1975, and this order of the Municipal Court apparently provides the basis for the present appeal."

The decision of the Court of Appeals of Montgomery County, Ohio in Case No. 4933, did not involve the constitutionality of Petitioner's conviction, or the validity of Section 806-31, Code of General Ordinances of the City of Dayton, Ohio. Under the American R. Express case, this is the decision from which Petitioner is appealing.

The questions Petitioner presents in his brief, should have been raised in Case No. 4320 in the Court of Appeals of Montgomery County, Ohio, which was filed immediately following Petitioner's conviction in Dayton Municipal Court. Under Rule 22(2) of the Supreme Court Rules, Petitioner should have filed his appeal to this Court on the constitutionality of his conviction in early 1974. Petitioner having failed to file a timely appeal concerning those issues, is now attempting to do so by filing Petition for a Writ of Certiorari, which involves issues not litigated in the State Courts.

CONCLUSION

Petitioner has failed to demonstrate that his appeal has any substance under Title 28 Section 1257(3) of the United States Code. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the within Brief for Respondent in Opposition, was mailed by regular mail, post-paid, to the Petitioner Walter Otto, 1017 Linda Vista Avenue, Dayton, Ohio 45405, this 10th day of September, 1976.

Edward M. Taylor, Jr.
Edward M. Taylor, Jr.
Asst. City Attorney